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SENATE

REPORT
101-259

OIL SHALE CLAIMS ACT OF 1990

MARCH 29 (legislative day, JANUARY 23), 1990.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 30]

The Committee on Energy and Natural Resources to which was referred the bill (S. 30) to provide for certain requirements relating to the conversion of oil shale mining claims located under the General Mining Law of 1872 to leases, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Oil Shale Clams Act of 1990".

SEC. 2. Notwithstanding any other provision of law, within sixty days from the date of enactment of this Act, the Secretary of the Interior (hereinafter referred to as "the Secretary") shall provide notice to each holder of an unpatented oil shale mining claim of the requirements of this Act. Such notice shall be made by registered mail and by publication in a newspaper of general circulation in the areas in which such claims are located.

SEC. 3. The holder of a valid oil shale mining claim who has filed a patent application by March 8, 1990, and has received first half final certificate for patent by date of enactment of this Act, may obtain a patent pursuant to the general mining laws of the United States.

SEC. 4. (a) Nothwithstanding any other provision of law, the holder of a valid oil shale mining claim who has filed a patent application by March 8, 1990, but has not received first half final certificate for patent by date of enactment of this Act may receive only a patent limited to the oil shale and associated minerals, upon payment of $2.50 per acre. Title to the surface and to all others minerals, including, but not limited to, oil, gas, and coal, shall remain in the United States. Patents issued pur-

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suant to this section shall provide for surface use to the same exent as is provided under applicable law prior to enactment of this Act with respect to oil shale mining claims, subject to the requirements of section 7 of this Act.

(b) Maintenance of claims referred to in this section prior to patent issuance shall be in accordance with the requirements of applicable law prior to enactment of this Act.

(c) Any holder of a valid oil shale mining claim referred to in this section may maintain such claim in accordance with the requirements set forth in section 6(b) of this Act in lieu of receiving a patent under this section.

SEC. 5. (a) Notwithstanding any other provision of law, within one hundred and eighty days from the date on which the Secretary provided notice under section 2 of this Act, a holder of a valid oil shale mining claim for which a patent application was not filed prior to March 8, 1990, shall file with the Secretary a notice of election to:

(1) proceed to limited patent as provided in subsection 6(a); or

(2) maintain the unpatented claim as provided for in subsection 6(b).

(b) Failure to file the notice of election as required by subsection (a) shall be deemed conclusively to constitute an abandonment of the claim by operation of law.

(c) Any claim holder who elects to proceed under subsection (a)(1) of this section must apply for a patent within two years from the date of election or notify the Secretary in writing prior to expiration of the two year period of a decision to maintain such claim as provided in subsection (a)(2) of this section or such claim shall be deemed conclusively to have been abandoned by operation of law.

(d) The provisions of this section shall be in addition to the requirements of section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

SEC. 6. (a) Notwithstanding any other provision of law, a claim holder subject to the election requirements of section 5 who elects to receive a limited patent shall receive title only to the oil shale and associated minerals, upon payment of fair market value for the oil shale and associated minerals. Title to the surface and to all other minerals, including, but not limited to, oil, gas, and coal, shall remain in the United States. Patents issued pursuant to this subsection shall provide for surface use to the same extent as is provided under applicable law prior to enactment of this Act with respect to oil shale mining claims, subject to the requirements of section 7 of this Act.

(b) Notwithstanding any other provision of law, a claim holder referred to in section 4 or a claim holder subject to the election requirements of section 5 who maintains or elects to maintain an unpatented claim shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this Act, except that the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary $550 per claim per year for deposit as miscellaneous receipts in the general fund of the Treasury, commencing with calendar year 1991. Such fee shall accompany the filing made by the claim holder with the Bureau of Land Management pursuant to section 314(a)(2) of the Federal Land Policy and Management Act (43 U.S.C. 1744(a)(2)).

SEC. 7. In addition to other applicable requirements, any person who holds a limited patent or maintains a claim pursuant to this Act shall be required to carry out reclamation as prescribed by the Secretary and to furnish a bond or other appropriate financial guarantee in an amount sufficient to ensure adequate reclamation of the lands to be disturbed by any aspect of the proposed mining activities.

SEC. 8. Without comment on the adequacy of current or former standards for determining validity of oil shale claims, Congress reaffirms the requirements of law that a patent may issue only to persons who hold valid claims and the need for careful review of any applications.

SEC. 9. Notwithstanding any other provision of law, with respect to any oil shale mining claim located under the general mining laws of the United States, no patent for such claim shall be issued except as provided by this Act.

PURPOSE OF THE MEASURE

S. 30, as reported by the Committee, provides for the treatment of oil shale mining claims located pursuant to the general mining laws of the United States. The legislation establishes three categories of claims and provides for the treatment of such claims pursuant to each category. S. 30 also provides for reclamation and bond submittal.

Background and Need

There are currently 1,597 unpatented oil shale mining claims located on approximately 241,420 acres in Colorado, Utah and Wyoming. These claims were located prior to 1920 pursuant to the General Mining Laws of the United States. Under that law claimants who locate valuable mineral deposits on Federal lands can apply for and receive a patent. When a patent is issued, the United States conveys to the claimant full fee simple title to the land for $2.50 per acre in the case of placer claims such as oil shale. To receive a patent, the claimant must have complied with all requirements of the mining law to maintain a claim. The requirements include the discovery of a valuable mineral deposit, performance of annual assessment work in the amount of $100 per year, and expenditure of $500 worth of labor or improvements prior to applying for a patent.

In 1920, Congress enacted the Mineral Leasing Act ("MLA"), which provided for the leasing of oil shale. However, the "savings clause" of the MLA (30 U.S.C. 193) grandfathered existing valid claims that were therafter maintained in compliance with applicable laws. Therefore, valid oil shale mining claims located prior to 1920 remained eligible to receive a patent if properly maintained.

The history of the grandfathered oil shale mining claims has been surrounded by controversy involving the standards to be used in judging whether claims have been maintained properly. The controversy resulted in extensive and hard-fought litigation spanning over 50 years and focused on the annual assessment and discovery requirements of the mining laws.

Recently, on May 1, 1985, the District Court for the District of Colorado issued a decision in favor of the claimants in *TOSCO Corporation* v. *Hodel,* 611 F. Supp. 1130 (D. Colo. 1985), rejecting efforts by the Department to challenge claims based on discovery and assessment work. The United States initially appealed the adverse decision. However, rather than pursuing the appeal, on August 4, 1986, the United States entered into a settlement agreement with the claimants of the 525 oil shale claims located on approximately 82,000 acres in the Green River Formation in Colorado. Under the settlement, the United States agreed to issue patents to the claimants, who received full title to the land, for $2.50 per acre. The United States retained a subservient mineral interest in the oil, gas and coal present within each of the claims. The settlement also provided for existing rights-of-way to continue until expiration, for reasonable public access for hunting, and stated the "present intention" of the claim holders to allow existing grazing to continue indefinitely as long as grazing does not interfere with development of underlying oil shale deposits. In addition, as part of the settlement, the District Court opinion was ordered vacated as moot on August 12, 1987.

The decision to settle was highly controversial, particularly in view of the Department's longstanding position in the litigation, the Interior Department's decision not to appeal despite the Regional Solicitor's strong recommendation to the contrary, and the possible precedential effect on outstanding oil shale claims not encompassed by the settlement, covering approximately 250,000 acres.

The General Accounting Office (GAO) has reported that 17,000 acres of settlement lands, for which the federal government received $42,500, sold weeks later to major oil companies for $37 million (The Mining Law of 1872 Needs Revision, GAO-RCED-89-72 March 1989).

According to the Department of the Interior, currently there are 27 patent applications pending for 359 claims covering 43,230 acres. Of these, 14 are for 192 claims on 30,265 acres in Colorado, and 13 are for 167 claims on 12,965 acres in Utah. In addition, there are approximately 1,238 oil shale mining claims for which a patent application has not been filed located on roughly 198,100 acres. Of these, 325 are in Colorado (51,926 acres), 573 in Utah (91,774 acres), and 340 in Wyoming (54,400 acres).

Legislative History

S. 30 was introduced on January 25, 1989, by Senator Wirth and cosponsored by Senators Johnston, Bumpers, DeConcini, Metzenbaum, Ford, and Sanford. A hearing was held by the Subcommittee on Mineral Resources Development and Production on July 31, 1989.

In the 100th Congress, Senators Melcher and Wirth introduced S. 2089, legislation similar to S. 30, and hearings were held.

Similar legislation, H.R. 2392, was introduced on May 17, 1989, by Congressman Rahall and cosponsored by Congressmen Miller, Campbell and Owens. The Committee on Interior and Insular Affairs reported the bill on May 23, 1989 (House Report 101-65) and the House of Representatives passed the bill on June 1, 1989.

H.R. 2392 was received in the Senate and referred to the Committee on Energy and Natural Resources on June 8, 1989, and a hearing was held on July 31, 1989. The Committee on Energy and Natural Resources ordered reported H.R. 2392 on March 8, 1990.

The provisions of H.R. 2392 were included in the fiscal year 1990 House budget reconciliation bill (H.R. 3299), with no similar provision included in the Senate budget reconciliation legislation. No agreement between the House and Senate was reached for budget reconciliation purposes.

Committee Recommendations and Tabulation of Vote

The Senate Committee on Energy and Natural Resources, in open business session on Thursday, March 8, 1990, by unanimous vote of a quorum present, recommended that the Senate pass the bill as described herein.

The rollcall vote on reporting the measure was 18 yeas and 0 nays, as follows:

YEAS	NAYS
Mr. Johnston	
Mr. Bumpers*	
Mr. Ford*	
Mr. Metzenbaum*	
Mr. Bradley	
Mr. Bingaman*	
Mr. Wirth	

Mr. Conrad
Mr. Heflin
Mr. McClure
Mr. Hatfield
Mr. Domenici*
Mr. Wallop*
Mr. Murkowski
Mr. Nickles*
Mr. Burns
Mr. Garn
Mr. McConnell*

*Indicates proxy vote.

Section-by-Section Analysis

Section 2 provides that, notwithstanding any other provision of law, within 60 days from the date of enactment of this Act, the Secretary shall provide notice to each holder of an unpatented oil shale mining claim of the requirements of this Act. Such notice shall be made by registered mail and by publication in a newspaper of general circulation in the areas in which such claims are located.

The Committee notes that while case law indicates that published notice is sufficient, the Secretary is being directed to provide notice by registered mail because of the short window provided to claimants to make an election under section 5 of the bill. However, failure of a claim holder to receive notice by registered mail is not intended to be a defense against any failure of a claim holder to take any actions required pursuant to this Act.

Section 3 provides that the holder of a valid oil shale mining claim who has filed a patent application by March 8, 1990, and has received first half final certificate by date of enactment, may obtain a patent pursuant to the general mining laws of the United States.

The Committee intends "first half final certificate" to mean the first page of the Mineral Entry Final Certificate issued by the Department of the Interior when the applicant for patent has complied with all the statutory provisions under 30 U.S.C. 29 et seq.

A patent application that is filed by March 8, 1990, and is substantively complete by such date is eligible to receive a patent pursuant to this section. The Committee wishes to emphasize that even if an applicant needs to modify an application or take other action (such as dividing a claim) which technically would result in a new filing under Department regulations, the Committee intends that the application be processed. The Committee believes that the result is appropriate in light of the foreclosure of future patenting.

Section 4(a) provides that, notwithstanding any other provision of law, the holder of a valid claim who has filed a patent application by March 8, 1990, but has not received first half final certificate by date of enactment may receive only a patent limited to the oil shale and associated minerals, upon payment of $2.50 per acre. Title to the surface and to all other minerals, including, but not limited to, oil, gas, and coal, shall remain in the United States. Patents issued pursuant to this section shall provide for the right to

surface use to the same extent as is provided under applicable law prior to enactment of this Act with respect to oil shale mining claims, subject to the requirements of section 7 of this Act.

Sections 4 (b) and (c) are self-explanatory.

The relevant case law states that a vested right to issuance of a patent does not arise until there has been full compliance with the extensive procedures set forth in the Federal mining laws for the obtaining of a patent (*Freese* v. *United States*, 639 F. 2nd 754 Ct. Cl. 1981), *cert. denied*, 454 U.S. 827 (1981)).

A patent application that is filed by March 8, 1990, and is substantively complete by such date is eligible to receive a patent pursuant to this section. The Committee wishes to emphasize that even if an applicant needs to modify an application or take other action (such as dividing a claim) which technically would result in a new filing under Department regulations, the Committee intends that the application be processed. The Committee believes that the result is appropriate in light of the foreclosure of future patenting.

Section 5(a) provides that, notwithstanding any other provision of law, within 180 days from the date the Secretary provided notice under section 2, a claim holder for which a patent application was not filed prior to March 8, 1990, shall file a notice of election to proceed to limited patent or to maintain the unpatented claim.

Section 5(b) provides that failure to file the notice required in subsection (a) shall be deemed conclusively to constitute an abandonment of the claim by operation of law.

Sections 5 (c) and (d) are self-explanatory.

Section 6(a) provides that, notwithstanding any other provision of law, a claim holder subject to the election requirements of section 5 who elects to receive a limited patent shall receive title only to the oil shale and associated minerals, upon payment of fair market value for the oil shale and associated minerals. Title to the surface and to all other minerals, including, but not limited to, oil, gas, and coal, shall remain in the United States. Patents issued pursuant to this section shall provide for the right to surface use to the same extent as is provided under applicable law prior to enactment of this Act with respect to oil shale mining claims, subject to the requirements of section 7 of this Act.

The Committee notes that claim holders electing to apply for a limited patent under this section must continue to maintain their claims prior to patent issuance in accordance with applicable law prior to enactment of the legislation.

Section 6(b) provides that notwithstanding any other provison of law, a claim holder referred to in section 4 or a claim holder subject to the election requirements of section 5 who maintains or elects to maintain an unpatented claim shall maintain such claim by complying with the general mining laws of the United States, and with the provisions of this Act, except that the claim holder shall no longer be required to perform annual labor, and instead shall pay to the Secretary $550 per claim per year. Payment of the $550 shall commence in calendar year 1991 and shall accompany the annual filing required by section 314(a)(2) of the Federal Land Policy and Management Act.

Section 7 provides that in addition to other applicable requirements, any person who holds a limited patent or maintains a claim

pursuant to this Act shall be required to carry out reclamation as prescribed by the Secretary and to furnish a bond or other appropriate financial guarantee in an amount sufficient to ensure adequate reclamation of the lands to be disturbed by any aspect of the proposed mining activities. The Committee notes that the reclamation requirements of this Act need not necessarily affect current reclamation regulations. It is the Committee's intent that a bond be required for any aspect of the proposed mining activities, regardless of the number of acres proposed to be disturbed.

Section 8 provides that, without comment on the adequacy of current or former standards for determining validity of oil shale mining claims, Congress reaffirms the requirements of law that a patent may issue only to persons who hold valid claims and the need for careful review of any applications.

The legislation reaffirms current law that patents shall issue only for valid claims. The Department shall carefully review patent applications for validity, including reviewing the following:

Proof of possessory title;

Evidence of discovery as of and prior to February 25, 1920, and at time of issuance of first half final certificate;

Compliance with location requirements;

Compliance with annual assessment requirements; and

The effect, if any, of prior contest proceedings.

Section 9 provides that, notwithstanding any other provision of law, with respect to any oil shale mining claim located under the general mining laws of the United States, no patent for such claim shall be issued except as provided by this Act.

Cost and Regulatory Considerations

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 21, 1990.

Hon. J. Bennett Johnston, Jr.,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 30, the Oil Shale Claims Act of 1990, as ordered reported by the Senate Committee on Energy and Natural Resources on March 8, 1990.

Enactment of S. 30 would result in additional receipts to the federal government as well as additional spending by the Department of the Interior. The receipts would consist of annual payments from claim holders to maintain claims as well as payments from some claim holders purchasing title to oil shale mining claims. Such payments to the government would probably total less than $500,000 in fiscal year 1991, and less than $5 million over the 1991–1995 period. Some of these receipts would be shared with the states. Assuming appropriation of the necessary funds, costs of up to $4 million could be incurred over the five-year period to examine

the validity of claims, in addition to undetermined costs for processing patent applications.

BILL PURPOSE

S. 30 would allow the Department of the Interior (DOI) to issue full patents under current law to oil shale claim holders who have already filed a patent application and have received certification from DOI by the enactment date of this act. (A patent is a government deed conveying legal title to public lands.) Under current law, these patents can be obtained for $2.50 per acre. According to the latest information from DOI, there are 68 claims covering about 10,500 acres eligible for full patents.

Limited patents conveying title only to oil shale and related minerals would be granted for $2.50 per acre to claim holders who had filed applications but had not been certified by March 8, 1990. A total of 294 claims covering about 33,000 acres would be eligible for these limited patents.

Any current claim holder who had not filed a patent application by March 8, 1990 (approximately 1,250 claims covering about 180,000 acres) would have the choice of purchasing a limited patent within two years for fair market value.

If claim holders in the second or third groups do not want to purchase limited patents, they could maintain their claims by complying with general mining laws and by paying $550 per claim per year to the federal government.

Holders of oil shale claims would be required to take certain steps to ensure that the affected land is reclaimed.

POTENTIAL RECEIPTS

The magnitude of potential receipts that would result from enactment of S. 30 is uncertain, because there is no basis for estimating the fair market value of limited oil shale patents. It is also unclear what claim holders would choose to do when faced with the choice of purchasing limited patents for fair market value, maintaining their claims by paying to the federal government $550 per claim per year, or relinquishing their claims altogether.

Whatever the claim holders choose to do, however, CBO estimates that receipts to the federal government would total less than $500,000 in fiscal year 1991 and less than $5 million over the 1991–1995 period. Half of any receipts from claim maintenance fees would have to be paid to the states, generally in the year they are received.

POTENTIAL COSTS

Based on information from the Bureau of Land Management, CBO estimates that costs would be incurred by the federal government to determine the validity of existing unpatented oil shale claims. Approximately 1,600 claims covering over 250,000 acres in Wyoming, Utah, and Colorado could have to be examined as a result of patenting provisions in this bill. Assuming that all claims for which a patent application has already been filed would be examined under current law, 1,250 additional claims could have to be

examined if claim holders eligible to purchase limited patents for fair market value apply for patents.

DOI is currently in the process of reviewing the status of all claims and is unable at this time to estimate how many claims can be validated easily with existing information. Based on information from the agency, we estimate that on-site validity examinations could cost approximately $3,000 per claim. If all of the remaining claims had to be examined by a mineral examiner of site, costs would total approximately $4 million over the next five years. Because we do not expect all claim holders to apply for patents and because not all claims will need to be examined on-site, it is likely that costs would be less than that.

Additional costs to estimate the fair market value of oil shale claims and to process patent applications could be incurred; however, we are currently unable to estimate the magnitude or the timing of such costs.

IMPACT ON STATE AND LOCAL GOVERNMENTS

No costs would be incurred by state or local governments as a result of enactment of this bill. Utah, Colorado, and Wyoming would receive 50 percent of any annual claim maintenance fees that are paid to the federal government.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff is Theresa Gullo, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in implementing S. 30. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 30, as amended.

EXECUTIVE COMMUNICATIONS

On January 31, 1989, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth executive views on S. 30. These reports had not been received at the time this report was filed. When the reports become available, the chairman will request that they be printed in the Congressional Record for the advice of the Senate.

Following is the Department of the Interior's statement at the July 31, 1989, hearing:

STATEMENT OF JAMES M. HUGHES, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR

I appreciate the opportunity to appear today to discuss S. 30 and H.R. 2392. We are opposed to enactment of both S. 30 and H.R. 2392. However, let me assure the Subcommittee that the Administration wants to resolve the issue of oil shale and would gladly work with the Subcommittee to do so. Before I explain the basis of our opposition to this legislation, I will briefly highlight the history of oil shale mining claims over the past 69 years, and what has brought us to the situation that exists today.

The Administration wants to resolve the oil shale issue. It remains an enigma some 70 years after many had thought Congress resolved it in 1920.

We have several items we think must be considered in any solution.

First, Secretary Lujan thinks the $2.50 an acre patenting fee is not a relevant figure in 1990. We are addressing that issue in a legislative proposal currently undergoing administration review.

Second, we are very concerned about the impact of the legislation on existing property interests and the related potential for "takings" exposure resulting from either S. 30 or H.R. 2392. At least 3 elements of the bills raise takings questions. First, the bills would require the payment of increased fees for assessment work and patenting and an excessive holding fee.

Second, the bills limit and in some instances preclude patent issuance irrespective of the status of existing claims. Third, and irrespective of existing mining claims, the bills offer an illusory choice either to lease or to retain the claim. Indeed, the requirements for retention of the claim in S. 30 are so stringent that the only real choice for the claimant is to convert his claim to a lease. In H.R. 2392, and 100-year claim cancellation provision turns the claim election into a lease.

Third, we feel strongly that oil shale is a separate issue in terms of the 1872 Mining Law as evidenced by its 1920 amendments to the Mineral Leasing Act.

Fourth, in our view many of the remaining claimants would be willing to ultimately accept a solution in which the Government retains rights to the surface and non-oil shale mineral deposits while the claimants receive title to the oil shale deposits together with the right to mine and remove them.

Fifth, we believe strongly that those who have patent applications pending should be grandfathered to reduce the "takings" risk.

Sixth, we believe that legislative recognition of the Department's discovery standard based on *Freeman* v. *Summers* is essential to prevent challenges to the Department's use of these standards in making validity determinations.

Seventh, we believe that it is essential that the Congress establish by law the Departmental standard of what is a sufficient time for the Federal Government to establish a lapse of assessment work so that a claim can be cancelled.

Eighth, both bills have unrealistic time frames for actions by both the Secretary and the claimants.

Frankly, we think all the parties involved in this issue are not as far apart as some might think. Perhaps following this hearing we might all get together and negotiate in good faith. We could resolve this.

Oil shale mining claims have presented the Department of the Interior with some very difficult issues that have eluded definitive solution for 69 years. Although the mining claims have been in existence for at least 70 years, policy debates and litigation often delayed the Department from taking final action on a significant number of claims. Basically, the history of oil shale mining claims have been the history of the executive, legislative and judicial branches of government wrestling with the question of what actions are required of an oil shale mining claimant in order to maintain the claim and go to patent. There is no clear, unequivocal interpretation of law to serve as a guide to the claimant and the Federal administrator so that all remaining claims can be handled consistently and equitably, with due recognition of any legal rights which may have enured to the claimants.

Although all three branches of government have addressed the issues surrounding oil shale mining claims, they have arrived at no definitive solution. We believe a legislative solution to these long standing issues is needed in order to:

Establish finality and certainty for the claimant and the Federal administrator;

Ensure that the equities of the claimant that have accrued over time are recognized and protected;

Eliminate time consuming and costly litigation; and

Establish an administrative process that is manageable by the Federal Government at a reasonable cost.

These are the key elements of the mining law in the context of oil shale mining claims.

LOCATION

To establish rights to oil shale under the mining laws, the claim must pre-date the Mineral Leasing Act of 1920. Oil shale was properly located as placer mining claims in rectangular form by legal subdivision (30 U.S.C. 35). State law controlled as to the form of monumentation and posting of notice on the ground. Basically, given that all oil shale claims are more than 69 years old, the veracity of the original locators is difficult to challenge and must be accepted at face value unless compelling evidence dictates otherwise.

RECORDATION

Recordation represents the intial filing of a notice of a claimant's interest in a valuable mineral deposit within the limits of a mining claim and the annual filing of affidavits of labor performed. Historically these filings were made only with the country. The Federal Land Policy and Management Act of 1976 required that a notice of location and annual filings of affidavits of labor, or notices of intent to hold, also be filed with the Bureau of Land Management (BLM).

Failure to make the initial filing with BLM as required by The Federal Land Policy and Management Act voids a claim. Any oil shale mining claim not filed initially by October 22, 1979, ceased to exist as of that date. Annual filings are monitored by BLM and any lapse conclusively voids the claim.

DISCOVERY

The discovery of a valuable deposit of minerals is the most fundamental aspect of the mining law (30 U.S.C. 22). Without discovery, there is no vesting of rights in the land.

During the 1920's the Department began patenting oil shale claims on lands of the Green River Formation. Initially this occurred where there was rich oil shale at the surface, and subsequently, where only lean beds were exposed which led to the inference that richer deposits were present at depth. This standard was delineated in a 1927 Departmental decision, *Freeman* v. *Summers,* the case in which the allowance of geological inference was first established, and the prospective value of oil shale was held to be sufficient for patenting.

This relaxed standard met with controversy. However, after the Senate Committee on Public Lands and Surveys, in 1931, examined the Departmental discovery standard as set out in *Freeman* v. *Summers,* the Committee Chairman, Senator Nye, advised the Department to proceed with patenting under this standard. From 1931 to 1960, the Department followed this policy. Five hundred twenty-three patents covering almost 350,000 acres were issued during this period.

In 1961 the Department changed its policy. DOI began to impose the traditional discovery standard placing emphasis on the lack of profitability of producing shale oil. In other words, it required a showing of the likelihood that a claim could be operated with a reasonable prospect of success as a commercial venture. This more restrictive discovery standard was rejected in 1980 by the Supreme Court in *Andrus* v. *Shell Oil Co.* when the majority held that Congress recognized the prospective value of oil shale in the Mineral Leasing Act and that *Freeman* v. *Summers* was correct.

MAINTENANCE (ANNUAL ASSESSMENT WORK)

The other major controversy associated with the management of oil shale mining claims since the passage of the Mineral Leasing Act in 1920 is the obligation to perform assessment work. The savings clause of that Act required oil shale mining claims to be maintained in accordance with the mining laws. Under the mining laws, to hold a claim, a claimant must perform at least $100 worth of assessment work per claim each year (30 U.S.C. 28). The purpose of this provision was to encourage diligent development of the claim. Failure to perform this labor allows location of an adverse claim by rivals, unless labor is resumed first. If labor is resumed before a rival claim is placed on the land, the resumption principle of the mining laws serves to bar adverse actions against the claim (30 U.S.C. 28).

In the 1920's and early 1930's, the Department contested a number of oil shale mining claims for failure to do assessment

work. These contests resulted in two Supreme Court decisions adverse to the Department. The first, *Wilbur* v. *Krushnic* (1930), held that the government was barred from contesting a mining claim for failure to perform annual assessment work as long as the claimant resumed performance prior to the contest. The second, *Ickes* v. *Virginia-Colorado Development Co.* (1935), held that the government could not contest the claims for failure to perform assessment work. As a result of these adverse court decisions, the Department reversed its decisions invalidating claims for lack of assessment work, and from 1935 to the early 1960's, issued patents to approximately 350,000 acres of land regardless of whether assessment work was done, continuing to use the *Freeman* v. *Summers* precedent to verify the discovery of a valuable oil shale deposit.

In 1960, the Department changed its policy regarding assessment work requirements. It began rejecting patent applications for oil shale claims that it deemed invalid because of lack of assessment work.

Plaintiffs in the recent TOSCO litigation challenged, in part, decisions invalidating their claims under this policy. These plaintiffs first brought suit which resulted in a District Court decision in 1966 that the Department lacked authority to contest the claims for lack of assessment work. This decision was affirmed by the Court of Appeals in 1969 and in 1970 the case came before the Supreme Court. The Supreme Court, in *Hickel* v. *TOSCO*, held that the Department could contest claims where a claimant failed to "substantially comply" with the assessment work requirement. The Supreme Court, however, did not define the term "substantial compliance" nor did it indicate any guidelines for developing a definition. Instead the Supreme Court remanded the case to the District Court to allow the applicants to bring their claims "within the narrow ambit meaning" of *Krushnic* and *Virginia-Colorado Development Corp.* Judge Finesilver, in deciding *Tosco* v. *Hodel,* held that this "narrow ambit" includes the holding in *Krushnic* that the resumption principle operates against the Federal Government as well as against rival locators. In fact, the government recognized the validity of this principle in the written arguments filed with the Supreme Court in the *TOSCO* case and expressly stated that it was not seeking to overturn it.

In 1972 the Department provided constructive notice alerting all mining claimants that their claims were subject to cancellation for failure to substantially comply with annual assessment requirements (43 CFR 3851.3[a]). Since 1972, the Department is in a better position to contest claims because of nonperformance of annual assessment work, subject to the constraint of the resumption principle.

The mining law (30 U.S.C. 28) provides that relocations can be made only while the claimant is in default of his annual obligation if there is to be a forfeiture of rights. Similarly, the Department must initiate contest action before a mining claimant resumes his labor or be barred from contesting the claim on this basis. In other words, as the Supreme Court held in *Wilbur* v. *Krushnic* (1930), the government may not take advantage of a past lapse of assessment work when such work is resumed prior to initiation of the contest.

Affidavits of assessment work filed with the Bureau of Land Management in 1979 and thereafter for all but 108 oil shale claims attest that such labor has been resumed. Filing under the Federal Land Policy and Management Act of a notice of intent to hold a mining claim creates no such presumption of performance of labor. Therefore, the filing of a notice of intent to hold a mining claim led BLM to challenge the claims on the basis that there had *not* been substantial compliance with the obligation to annually perform labor, or make improvements, of not less than $100 per claim. The Department successfully eliminated 108 oil shale mining claims in this manner. The Department accepts the affidavits of assessment work filed annually since 1979 under section 314 of the Federal Land Policy and Management Act (FLPMA) as factual unless compelling evidence to the contrary is presented.

We have exercised our option as a "rival locator" to contest these claims during this presumed lapse of annual assessment work, in keeping with the constraints imposted by the resumption principle. Our contesting of those 108 mining claims for which no affidavits of assessment work were filed for the last 2 or more years demonstrates that we will insist upon performance of the statutory minimum amount of annual assessment work and will monitor compliance by way of annual filing requirements of the Federal Land Policy and Management Act. We will continue to inquire into alleged nonperformance of assessment work obligations by initiating contest proceedings, when, and if, notices of intent to hold, rather than affidavits of assessment work, are filed for two consecutive years. A 1-year lapse is insufficient to permit contest by the government based on the decision in *Ickes* v. *Virginia-Colorado Development Corp.*, where the Supreme Court refused to allow invalidation of a claim with a 1-year lapse. When the Suprme Court established the "substantial compliance" standard in the *Hickel* v. *Tosco* decision, it recognized that the earlier Court in *Ickes* had allowed a 1-year lapse. Since the Court did not overrule *Ickes* in its *Tosco* decision, and in fact recognized its continued, albeit limited, applicability, we will wait for a 2-year lapse before initialing a contest.

S. 30

S. 30 is intended to address the outstanding oil shale claims. Section 2 of S. 30 would provide that with regard to any oil shale claim located prior to enactment of the Mineral Leasing Act, no patent could be issued after January 25, 1989, except for those claims for which a patent application had been filed and all requirements for a patent had been fully complied with by January 25, 1989.

Section 3 of the bill would require the owner of a valid oil shale mining claim located under the General Mining Law of 1872 prior to enactment of the Mineral Leasing Act to make an election either to convert the claim to a lease or to maintain the claim by complying with the mining laws and the additional requiremets of S. 30. The Secretary would be required to notify the owner of each claim of the required election within 30 days of enactment of the act, and the claimant would have to make the election within 180 days of enactment of S. 30. Failure to make an election within that

period would be deemed conclusively to constitute an abandonment of the claim.

If the holder of a claim required to make an election decided to convert the claim to a lease, the lease would be required to be issue within 60 days of the election and would be administered in accordance with the Mineral Leasing Act, with certain exceptions.

Section 3 also would allow a holder of a claim to elect to maintain the claim by complying with the mining laws of the United States and the provisions of S. 30, that would require that:

> Beginning with the date of enactment of S. 30, $1,000 worth of labor must be performed or improvements made during each and every year. Failure to fulfill the requirement each and every year would constitute an abandonment of the oil and shale mining claim; and
>
> In addition to the requirements of section 314 of the Federal Land Policy and Management Act, the owner of an unpatented oil shale mining claim would have to file annually an affidavit of assessment work. Failure to file the affidavit would constitute an abandonment of the oil shale mining claim.

Section 4 of S. 30 would amend the mineral Leasing Act by adding a new section 45 which would prohibit the Secretary from issuing or approving the assignment of any lease under the terms of the Mineral Leasing Act to any entity that elects to hold an unpatented oil shale mining claim rather than convert such claim into a lease under the terms of S. 30.

Section 5 of S. 30 would provide that any person holding a lease or maintaining a claim pursuant to the bill would be require to reclaim the site and to post a bond before disturbance of the site to guarantee reclamation. Any person holding a lease issued or readjusted pursuant to section 21 of the Mineral Leasing Act of 1920 after the date of enactment of S. 30 also would be subject to such requirements. The Secretary of the Interior would be required to promulgate regulations as necessary to implement S. 30.

We are strongly opposed to enactment of S. 30, for several reasons.

Section 3(b)(3) would eliminate the proviso in the Mineral Leasing Act that allows the Secretary to waive rent and royalty payments for the first five years of an oil shale lease in order to encourge production. We believe that the Secretarial discretion should be retained so that if the need arises, production can be encouraged. If the intention of this bill is to promote orderly development through leasing, this provision is certainly contrary to that goal.

Sec. 3(b)(5) sets the royalties on any claims that are converted to leases at not less than 12.5 percent rather than allowing the Secretary to exercise discretion to promote development of the resource. We believe the bill would provide for Secretarial discretion.

Section 4 of S. 30 would disallow the issuance of a lease under the Mineral Leasing Act of 1920, as amended, to any entity that elects to hold an unpatented oil shale mining claim rather than convert such claim into a lease under the terms of section 3(b) of S. 30. This prohibition is similar to the diligence requirement in section 3 of the Federal Coal Leasing Amendments Act of 1976 except that it would extend to all oil shale claimants whether or not there

had been diligent development of oil shale on the claim. For owners of oil shale claims that wish to seek mineral leases for oil, gas, coal, sodium, potash, phosphate, gilsonit or geothermal resources, S. 30 is an absolute curtailment of their rights to bid for leases on these commodities. If the largest companies holding oil shale mining claims were prevented from obtaining any other mineral leass under the Mineral Leasing Act, the effect would be catastrophic to the claim holder as well as to the Federal Government. If a major corporation is eliminated from bidding for other minerals, the reduced competition could easily result in lower bids that would mean less revenue to the Federal and State governments.

The Mineral Leasing Act in 30 U.S.C. 241(a) already contains an invitation to voluntarily convert pre-1919 oil shale claims into leases. To the best of our knowledge no takers have come forward.

Few, if any, oil shale claim owners would be willing to convert a mining claim to a lease under S. 30 because a lease will expire at the end of 20 years if commercial production is not ongoing then. In addition, even if production were accomplished on the leasehold, the requirement to pay royalty diminishes the value to the claimant of the property that enured under the mining laws and thus might constitute a taking.

We feel the bonding provision in section 5 is unnecessarily restrictive. It would be more appropriate to allow the Secretary to determine whether a bond or some other type of financial guarantee satisfactory to the Secretary that assures reclamation.

H.R. 2392

Where provisions of S. 30 and H.R. 2392 are similar, we have the same objections to both. I will briefly discuss the principal differences between H.R. 2392 and S. 30 and then address our concerns.

Section 2 of H.R. 2392 would amend section 37 of the Mineral Leasing Act. New section 37(b) would require that the Secretary, within 30 days after enactment, publish proposed regulations containing standards and criteria for determining validity of oil shale claims. The Secretary would be required to promulgate final regulations not more than 180 days after the proposed regulations are published. The Secretary would then be required to make determinations as to the validity of all oil shale claims within 2 years of the issuance of final regulations. Priority would be given to those claims for which patent applications had been filed prior to January 24, 1989, which had met all the requirements of law. S. 30 has no comparable provision.

We object to the requirement for determinations of validity to be made in 2 years because it is unrealistic. It is well established in both administrative and judicial case law that a mining claim must be presumed to be valid until affirmatively established otherwise. Mining claimants must be given an opportunity to be heard on questions of fact regarding the validity of their claims.

The Interior Department meets this due process burden by holding evidentiary hearings. Not until a final administrative decision of the Secretary is issued, usually by the Interior Board of Land Appeals [IBLA], can a mining claim be declared void. Unless the bill contemplates a "map exercise" to verify discoveries required

under the mining law and a reliance solely upon affidavits of assessment work without field inspections to verify resumed assessment work, an army of geologists and mining engineers would be required to meet this requirement. Even then, assuming that a significant portion of the approximately 1,600 outstanding claims are contested, it is not possible to conclude the hearings and potential appeals within 2 years. The cost to BLM of doing field examinations and preparing mineral reports on that number of claims has been estimated to be approximately $5 million. Further costs would be incurred by the Department's Office of Hearings and Appeals, BLM, and the Office of the Solicitor during the prosecution of contests.

In addition to the cost, the completion of field work and mineral report preparation and review could easily require 5 years aside from the time needed for contests and appeals.

H.R. 2392 provides no guidance as to the standards of validity the Secretary would be expected to use. Normally, the Department follows case law. However, with respect to oil shale the interpretation of some of the decisions rendered by the courts has been a matter of considerable criticism after the Department negotiated the settlement of the *TOSCO* v. *Hodel* litigation in 1986.

New section 37(d)(3) would require the holder of an oil shale claim that elects to maintain it as a mining claim, rather than converting to a lease, to make diligent development expenditures upon each claim of not less than $5,000 annually. Although not called assessment work, that is indeed what this requirement is. S. 30 has a similar election requirement but would raise the assessment work requirement for oil shale claims to $1,000 per claim per year. We believe the 50-fold increase in H.R. 2392 is unrealistic and unsupportable. One hundred dollars in 1872 equalled approximately 20 days of labor, valued now at about $1,700—$2,000, not $5,000.

New section 37(d)(3)(B) would allow holders of mining claims to make a $5,000 payment to the Secretary in lieu of diligent development. Such moneys would be split 50–50 between the General Fund of the U.S. Treasury and the State in which the claim lies. S. 30 has no such provision.

Mineral Leasing Act revenues are shared with the States on a 50–50 distribution in order to assist the States with funding the infrastructure of roads and schools that mineral development and employment bring. However, it is hard to justify sharing with the States the payment in lieu of diligent development as proposed in H.R. 2392 since the States will not incur any infrastructure cost until development takes place.

We believe that few if any claimants would elect the payment in-lieu option. Because their own labor qualifies as an expenditure, it would be necessary for the Secretary to evaluate such labor. This is an enormous task in terms of additional personnel and funds to monitor the performance of this diligent development work.

New section 37(d)(3)(F) would deal with unpatented oil shale claims not producing in commercial quantities within 100 years from their dates of location, or about 2018–19 for most claims. If production is occurring as of that date, the claim would still be canceled if commercial production ceased thereafter, presumably irrespective of the cause. S. 30 has no similar provision.

This provision would subject the unpatented claimant to the whims of the oil market and he may have to produce at a loss in order to maintain his possessory right if conditions so warranted. To avoid this, a claimant could seek patent to the oil shale and associated minerals within the claims, but section 2(f) would raise the $2.50 per acre price for placer claims now established by the Mining Law to $2,000 per acre for oil shale.

While we are opposed to the enactment of S. 30 and H.R. 2392, we would like to work with the Subcommittee in a cooperative spirit to come up with a solution to the issues relating to oil shale claims.

This concludes my statement. I will be pleased to answer questions.

ADDITIONAL VIEWS OF SENATOR WIRTH

The legislation as reported by the Committee is a substantial departure from the provisions of S. 30 as I introduced it. I support S. 30 as reported because I believe it represents a compromise that is needed to resolve the 70-year-old controversy over oil shale mining claims. However, my bill would have required all claims other than those for which a patent application was filed and all requirements fully complied with to elect to maintain the claim or convert the claim to a lease. The compromise provides an opportunity for all claim holders to receive a patent limited to oil shale and associated minerals.

I have agreed to this compromise reluctantly. All of these claims were located on federal lands over 70 years ago. Case law is clear that a vested right to issuance of a patent does not arise until there has been full compliance with the extensive procedures set forth in the federal mining laws for obtaining a patent (*Freese* v. *United States*, 639 F.2d 754 (Ct.Cl. 1981), *cert. denied*, 454 U.S. 827 (1981)). Given that no right to patent vests until that point, there can be no question that Congress can legislatively withdraw the patent option and that such action is not a taking.

The compromise provides a window of opportunity for claim holders with no application currently filed to receive a patent limited to the oil shale and associated minerals. Nothing in the law indicates any constitutional or other legal duty for us to do this. It represents a political compromise which attempts to deal with the requests of some shale claimholders for continued opportunity to establish title to shale resources on federal lands. In reaching this compromise, I believe we are being very generous indeed to claimholders who have already had 70 years to apply for a patent.

I firmly believe that it never was the intent of Congress to enable these claims to be held for over 70 years with virtually no production. Little, if any, oil shale has been produced from the mining claims. The Mining Law of 1872 is a mineral development statute, not a mineral speculation statute. If we had foreclosed patenting of any further shale claims, they would still be available for mining. And if every claim now extant was found to be invalid, that would still leave these shale areas open to use under the Mineral Leasing Act.

In my opinion the validity of many of these claims is highly suspect. It is nearly impossible to tell 70 years later if the claims originally were validly located prior to 1920. For a variety of reasons, annual assessment was not performed on these claims in some cases for over 20 years. The discovery standard for oil shale claims is an aberration, allowing deposits with no present marketability to be declared valuable deposits, contrary to the discovery standard of the Mining Law for all other locatable minerals. Many claims have in the past been contested on these grounds by the Department.

The compromise requires the Department to carefully review the applications to ensure that only valid claims receive patent. A careful, thorough, and demanding review of the validity of each claim prior to patent is essential to achieving resolution of many of the public concerns surrounding the oil shale issue, and I hope the Committee will follow the Department of Interior's handling of these reviews closely.

Lastly, the compromise does accomplish a most important goal. S. 30, as reported, retains the surface of the oil shale claims in federal ownership for all but a few claims. This is significant, especially in my state, where in 1986 fee title to 82,000 acres of federal land transferred to oil shale claimants pursuant to the settlement of *TOSCO Corporation* v. *Hodel*, 611 F. Supp. 1130 (D. Colo. 1985) and where there are an additional 80,000 acres of outstanding oil shale claims. There is no reason to believe that oil shale development would require, or even necessarily be better off with, the transfer of surface rights to private parties. There is every reason to believe that the surface values of these lands do represent an important public asset, for reasons of public access, wildlife management, recreation, and grazing.

The retention of public ownership of the surface is the single most important feature of the compromise, from my point of view, and it makes the bill, as reported, a worthwhile compromise of issues that have been contentious and controversial for 70 years.

TIMOTHY E. WIRTH.

ADDITIONAL VIEWS OF SENATORS McCLURE, WALLOP, MURKOWSKI, NICKLES, BURNS, GARN AND McCONNELL

Although we support the action of the Committee in an effort to resolve this situation, we do so with several serious reservations.

We regret that the Committee did not retain the option for holders of valid unpatented claims to at some point in the future obtain a limited patent at fair market value beyond the limited window contained in the Committee amendment. A valid unpatented mining claim is a property right and the limited patent would confer no additional rights on the holder. It would in no manner limit or affect the federal government's ability to control surface or other uses. It would, however, provide the security of title which may be necessary to secure financing to develop the claim. The limited window available under the Committee proposal is simply short-sighted. We firmly believe that this Nation, and apparently also this Committee, has not yet learned how fragile our energy situation is, and at some time we will have to return to shale oil as a part of our energy mix. When we lose our complacency, we will probably have to revisit this issue.

We also have some concern over the $550 assessment fee. We understand the nature of compromise, but that is rarely a substitute for policy. We do think it is important to provide applicants with an option to pay the assessment to the government rather than spending it on the claim to the extent that such a payment would prevent unnecessary surface disturbance. That is probably more important with a higher assessment fee than it is at present. We would have preferred that the joint proposal had given the claimant the option rather than relieving him of the annual work requirement and providing for payment to the Secretary. We do want to emphasize, however, that this is still an assessment fee not a holding fee. In effect, what the Committee has reported is a penalty payment which will apply to any claimants who actually work their claims, while increasing administrative burdens on the Department. The intent of the payment appears to be to guarantee that some amount of money is actually expended on each claim and a belief that there are claimants who annually file affidavits without actually performing $100 worth of assessment work. Any claimant who adopts that approach runs the real risk that the claim will be invalidated, and in the case of oil shale such a claim can not be relocated. Providing the claimant the option would satisfy the concerns in a more realistic manner.

Our last concern is more serious. Federal law currently provides an open offer to any holder of a valid mining claim to obtain a patent. The case law is clear, we believe, that the actions of the Department in adjudicating title and making a validity determination are purely ministerial and nondiscretionary. At such time as the payment is made, equitable title vests in the applicant and transfer

of legal title can be compelled. Until changed, the law remains, and we wonder if those who are so quick to criticize the Secretary and who support either Congressional or self-imposed moritoria would be so generous if it were the Endangered Species Act or some other statute which the Executive so blithely chose to ignore. Congress of course has the right to change the law and withdraw the offer of a patent or change the nature of the patent offer. The amendment which Senator McClure had offered would have done that.

There is a line however between an action to withdraw or alter an offer and the taking of a right. We believe that the Committee reported amendment strays over the line. Once an applicant accepts the government's offer he has reasonable investment backed expectations and a legally enforceable right both to the process, and upon determination of a valid claim and chain of title, to the issuance of a patent. If our objective is solely to prevent transfer of the surface rights to applicants who file prior to the date the law actually changes, then we will have accomplished our objective. The cost, we believe, will be that our actions have taken those rights and we will have to compensate. The government will not go into that adjudication with clean hands. Both Congress and the Executive have conspired to prevent applicants from obtaining rights under federal law. While there is no case that we are aware of on point with respect to the ability of the federal government to interfere with the patenting process once initiated but prior to the actual payment of the fee, we think the Committee has stepped over the line and enactment of this legislation will wind up being far more costly to the federal government than would Senator McClure's amendment, with less to show.

There is also a very real danger that the draconian approach taken by the Committee will encourage claimants to apply for patent prior to enactment of the legislation solely for the purpose of seeking competition for the value of the full fee under current law. The action of the Committee does not alter federal law, only enactment would do so. Until that time, the provisions of the Mining Law remain unaltered. The offer of a patent remains available to any claimant. The refusal of the Secretary of the Interior to faithfully executive the laws of the land are hardly likely to impress a court. We would note that the Committee amendment itself contains a theoretical problem in that a claimant could file for patent after the date of the Committee action and, assuming there is no challenge to the claim, receive the first part of the final certificate, pay his fee, and acquire equitable title all before enactment of this legislation. In that situation, enactment of the Committee amendment will clearly result in a taking. Relying on the continued unwillingness of the Department to comply with federal law to prevent such an occurrence may provide solace to some, but not to us.

There were better alternatives available to the Committee which would have resolved the issues raised with respect to oil shale claims. Providing real alternatives during a limited window with the possibility of a limited patent in the future at fair market value, as Senator McClure's amendment would have done, was one such approach. We regret that the Committee chose to embark on the approach it did. We believe that the Committee amendment

will wind up costing the federal government for takings which could have been avoided and ignores the commercial realities of mining and the purpose of patenting.

JAMES A. MCCLURE,
Ranking Minority Member.
FRANK H. MURKOWSKI.
CONRAD BURNS.
DON NICKLES.
MITCH MCCONNELL.
MALCOLM WALLOP.
JAKE GARN.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 30 as reported.

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